

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Calpine Corporation, Dynegy Inc., Eastern Generation, LLC, Homer City Generation, L.P., NRG Power Marketing LLC, GenOn Energy Management, LLC, Carroll County Energy LLC, C.P. Crane LLC, Essential Power, LLC, Essential Power OPP, LLC, Essential Power Rock Springs, LLC, Lakewood Cogeneration, L.P., GDF SUEZ Energy Marketing NA, Inc., Oregon Clean Energy, LLC and Panda Power Generation Infrastructure Fund, LLC

Docket Nos. EL16-49-000

v.

PJM Interconnection, L.L.C.

ER18-1314-000

PJM Interconnection, L.L.C.

ER18-1314-001

PJM Interconnection, L.L.C.

**EL18-178-000
(Consolidated)**

**REQUEST FOR REHEARING OF
THE ORGANIZATION OF PJM STATES, INC.**

Pursuant to Section 313(a) of the Federal Power Act (“FPA”), 16 U.S.C. § 8251(a), and 18 C.F.R. § 385.713, the Organization of PJM States, Inc. (“OPSI”), respectfully requests rehearing¹ of the Commission’s *Order Rejecting Proposed Tariff Revisions, Granting in Part and Denying in Part Complaint, and Instituting Proceeding Under Section 206 of the Federal Power Act*,

¹ Approved on July 25, 2018, and adopted by OPSI’s Board of Directors: Vote: Yes: Delaware PSC, PSC of District of Columbia, Illinois CC, Indiana URC, Kentucky PSC, Maryland PSC, Michigan PSC, New Jersey BPU, PUC Ohio, Pennsylvania PUC, North Carolina UC, Tennessee PUC, and PSC West Virginia; Abstain Virginia SCC

issued on June 29, 2018 (“June 29 Order”) in this now consolidated proceeding.² OPSI unanimously commented in protest to the PJM Interconnection, L.L.C. (“PJM”) filing that initiated Docket No. ER18-1314, urging the Commission to reject PJM’s filing and maintain the status quo.³ Although the Commission’s June 29 Order rejects PJM’s filing, the Commission also found that the status quo is unjust and unreasonable.⁴

In rendering this decision, the Commission erred in determining, absent evidentiary support in the record, even after consolidation, that PJM’s tariff is unjust and unreasonable. Neither the Commission nor the complainants have met their burden of proof under Section 206 of the Federal Power Act (FPA) to prove “that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential.”⁵ Rather, the Commission has accepted complainants’ evidence, based in theory, conjecture and speculation, as sufficient to deem the status quo as unjust and unreasonable because of alleged effects of valid state public policies. OPSI has previously stated that “FERC should expect, and require, that PJM respect the resource choices of state policy-makers unless there is a legal determination that a state policy impermissibly intrudes into matters properly reserved for federal oversight.”⁶ In its June 29 Order, the Commission ignores OPSI’s position and endorses PJM’s efforts to thwart lawful state policies without the necessary supporting evidence. Absent evidence, the

² *Calpine Corp., et al.*, 163 FERC ¶ 61,236 (June 29, 2018) (hereinafter “June 29 Order”).

³ See OPSI Comments, Docket No. ER18-1314 (hereinafter “OPSI Comments”).

⁴ June 29 Order, at P 5-6.

⁵ 16 U.S.C. § 824e(b).

⁶ OPSI Comments, at 2.

Commission's decision is arbitrary and capricious. Thus, OPSI urges the Commission to grant this request for rehearing.⁷

I. STATEMENT OF ISSUES AND SPECIFICATION OF ERRORS

Pursuant to Rule 713(c)(2), OPSI hereby requests rehearing on the following issue:

A. The Commission erred in finding, absent evidentiary support, that PJM's existing tariff is unjust and unreasonable.

II. ARGUMENT

The June 29 Order cites the increased amount of current or potential out-of-market payments provided or required by certain states, for the purpose of supporting the entry or continued operation of preferred generation resources that supposedly may not otherwise be able to succeed in a competitive wholesale capacity market, as a threat to the integrity and effectiveness of the capacity market administered by PJM.⁸ The Commission concludes that these out-of-market payments enable certain resources to reduce the price of their offers into capacity auctions below the price at which they otherwise would offer absent the payments, potentially resulting in lower auction clearing prices.⁹

The June 29 Order addresses two related proceedings: (1) A complaint by Calpine Corporation, et al., in Docket No. EL16-49, which argues that the minimum offer price rule ("MOPR") currently in PJM's tariff does not address the impacts of the out-of-market payments, and (2) tariff revisions filed by PJM in Docket No. ER18-1314, proposing either a two-stage

⁷ Notwithstanding request for rehearing, OPSI and all of its member state commissions preserve all rights and privileges (including intervention and associated with the new docket, EL18-178, wherein FERC seeks to determine the replacement rate for the status quo).

⁸ June 29 Order, at P 1.

⁹ *Id.* at P 2.

annual auction bifurcating price setting and quantity commitment, or expanding PJM's existing MOPR to mitigate capacity offers from both new and existing resources, subject to certain proposed exemptions. Based on the combined records of the Calpine complaint proceeding and the PJM filing, the Commission found PJM's tariff to be unjust and unreasonable, rejected the changes proposed by Calpine and PJM, and initiated an FPA Section 206 proceeding in Docket No. EL18-178-000.¹⁰ Citing an inability to determine, based on the record of either proceeding, a new just and reasonable rate, the June 29 Order initiated a paper hearing to address a suggested alternative approach in which PJM would: (1) modify its existing MOPR to apply to new and existing resources that receive out-of-market payments, regardless of resource type, but would include few to no exemptions, and (2) establish a fixed resource requirement alternative option that would allow, on a resource-specific basis, resources receiving out-of-market support to choose to be removed from the PJM capacity market, along with a commensurate amount of load, for some period of time.¹¹

A. The Commission Erred in Finding, Absent Evidentiary Support, that PJM's Existing Tariff is Unjust and Unreasonable.

The Commission erred in finding, absent evidentiary support, that PJM's existing tariff, the status quo, is unjust and unreasonable. Section 206 of the FPA enables the Commission to determine whether an existing rate is "unjust, unreasonable, unduly discriminatory or preferential"¹² In a Section 206 proceeding, the burden is on the Commission or the complainant, not

¹⁰ *Id.* at P 3-6.

¹¹ *Id.* at P 7-8.

¹² 16 U.S.C. § 824e(a).

the utility.¹³ In the instant matter, the burden to show that PJM’s tariff is unjust and unreasonable was not carried.

The record in this proceeding, even upon consolidation, includes no direct evidence and only unpersuasive circumstantial evidence showing that states’ exercise of their FPA authority over generation interferes with the Commission’s responsibility to ensure resource adequacy at just and reasonable rates. OPSI protested PJM’s proposed tariff revisions, in part, because PJM only offered a brief simulation of an unrelated scenario and affidavits that contribute little or nothing to justify the immediate need for action against state policies.¹⁴ PJM submitted affidavits in lieu of the empirical facts and data necessary to establish the justness and reasonableness of its proposed market changes and resulting price increases. The June 29 Order follows suit.

Much like PJM, the Commission asserts “action must be taken” because PJM’s tariff is unable “to adequately address the evolving circumstances presented by resources that receive out-of-market support.”¹⁵ Although the Commission claims there is evidence that state policies *may* significantly affect the capacity market price,¹⁶ neither PJM affiant described any specific capacity price offer that was reduced, or any actual capacity clearing price that was in fact suppressed, as a result of a capacity resource receiving out-of-market revenues pursuant to state policies. While the Commission references statements by a PJM affiant, such references do not

¹³ 16 U.S.C. § 824e(b).

¹⁴ OPSI Comments, at 3 and 7.

¹⁵ June 29 Order, at P 32.

¹⁶ *Id.* at P 151.

otherwise support its determination.¹⁷ The Commission asserts that certain public policies *may* affect capacity market prices and that those public policies *may* affect the “integrity” of PJM’s capacity market, but fails to provide any actual evidence to that end. Ultimately, the June 29 Order lacks the necessary evidentiary support for its conclusions.

When weighed against the substantial evidence supporting retention of the status quo, the Commission’s inadequate evidentiary foundation is exacerbated. As OPSI has previously stated, PJM’s capacity market is robust, with a capacity surplus well in excess of the region’s reserve margin, 1,401 MWs of new generation clearing PJM’s most recent reliability pricing model (“RPM”) auction, and tens of thousands of MWs of capacity under development in the region. The continued development of existing and new capacity resources in PJM stands in clear juxtaposition to the Commission’s conclusion that state policy decisions “compromise the market, because investors cannot predict whether their capital will be competing against resources that are offering into the market based on actual costs or on state subsidies.”¹⁸ The Independent Market Monitor’s State of the Market Reports for PJM document the growth in new capacity resources. In December, 2013, there were 67,299 MW in generation request queues for construction.¹⁹ By December, 2017, that number was 99,453 MW, and it continued to grow to 100,179 MW by March, 2018.²⁰ The objective factual evidence of existing capacity, number of

¹⁷ *Id.* at P 151-153; *Id.* at 11 (Glick, Comm’r, dissenting) (stating that “[dividing] the size of a subsidy by the number of MW-days is arithmetic, not evidence that the subsidy is rendering PJM’s Tariff unjust and unreasonable”).

¹⁸ *Id.* at P 150.

¹⁹ Monitoring Analytics, LLC, *State of the Market Report for PJM - 2013*, at 345 (March, 2014).

²⁰ Monitoring Analytics, LLC, *State of the Market Report for PJM - 2017*, at 537 (March, 2017); Monitoring Analytics, LLC, *Quarterly State of the Market Report for PJM - 2018*, at 548 (May, 2018).

new entrants and new capacity under active development in the PJM markets contradicts the theoretical arguments of the complainants, as well as the unsupported conclusions of the Commission, regarding the integrity of wholesale capacity market prices harmed by some resources receiving out-of-market revenues. Thus, the Commission erred in finding, absent evidentiary support, that PJM's existing Tariff is unjust and unreasonable.

IV. CONCLUSION

For the foregoing reasons, OPSI respectfully requests that the Commission grant the request for rehearing.

Respectfully submitted,

/s/ Gregory V. Carmean

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Dated: July 30, 2018

CERTIFICATE OF SERVICE

I hereby certify that the foregoing has been served in accordance with 18 C.F.R. Section 385.2010 upon each party designated on the official service list compiled by the Secretary in this proceeding, by email.

s/s Gregory V. Carmean

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Dated at Newark, Delaware this July 30, 2018.